

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

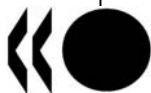
ROUNDTABLE ON COMPETITION AND SPORTS

Note by the delegation of BIAC

This note is submitted by the delegation of BIAC to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16 - 17 June 2010

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ROUNDTABLE ON COMPETITION AND SPORTS

-- Note by BIAC --

1. The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its Roundtable on Competition and Professional Sports.¹

2. Solidarity Mechanisms

2. As acknowledged by the European Commission in its 2007 White Paper,² sport is highly dependent on intellectual property rights and investment in both professional and grassroots competitions. Sports would struggle without direct investment in grassroots competitions from commercially successful rights owners. Grassroots sport is the foundation of any professional competition, and therefore the professional game nurtures its grassroots by reinvesting a substantial part of its revenues in development programmes.

3. In the UK, according to the 2008 study during the French presidency of the EU, the Department for Culture, Media and Sport invested €174.8 million across all sports on behalf of the Government and taxpayer, whereas professional football organisations, of their own volition, invest €185m in grassroots football alone (through the combined contributions of the Football Association and the Premier League).

4. Moreover, in many European countries, investment in grassroots sport is directly and proportionately dependent upon the value of sports rights. In the UK, the major sports have signed up to a voluntary code of conduct run by the CCPR³ which ensures a minimum percentage of the income from TV rights is directly invested in grassroots sports. In Germany, a contract signed by the professional football league and the federation secures 3% of the league's turnover to be transferred to grassroots organisations. Another contribution is given directly by the professional football clubs. In France, a similar agreement leads to a €60m investment into grassroots sport.

2. Exclusivity: a Key Principle Beneficial to Consumers and Sports

5. In 2003, the European Commission issued a decision concerning UEFA's selling of media rights, which has since served as a template for the sale of rights by sports bodies across Europe. In this decision and others (e.g. Premier League and Bundesliga), the EC has explicitly endorsed the principle of exclusivity.

1 This paper has been substantially prepared on behalf of BIAC by the Sports Rights Owners Coalition ("SROC") which is an informal group of representatives of international, European and national sports bodies operating as a forum through which sports bodies can share information and experiences including best practice on key, legal, political and regulatory issues.

2 COM(2007) 391 final, 11 July 2007, page 11.

3 Central Council of Physical Recreation, representing 300 members, 150,000 clubs and 13 million regular participants.

6. There are multiple benefits of this model: for the consumer who does not have to subscribe to a host of media suppliers to follow one competition; for the media supplier who can increase revenue from advertising; for the advertisers who will have a defined target demographic; and for the sport which can improve revenue through the enhanced value of this exclusive agreement. All these benefits are set out in more detail in the Commission's 2003 decision. While the Commission's decision supports the exclusivity model on the grounds of economic efficiency, it has also clearly recognised the benefit to grassroots sport through solidarity mechanisms. Estimates suggest that the exclusivity of media rights adds substantial value to contracts and this added-value contributes to a substantial investment in grassroots sport.

7. In UEFA's case, the beneficiaries of exclusivity and collective selling are often teams from smaller European countries and grassroots sport in general. Roughly 70% of the media rights from the UEFA European Football Championship are redistributed to the national federations, with that money specifically ring-fenced for grassroots projects.

3. Territoriality as a Part of the Sports Rights Business Model

8. According to a 2009 study from RBB Economics,⁴ "the EU consists of member states with distinct cultural, linguistic and viewing preferences. The European audio-visual industry is organised to accommodate those differences and ensure that a targeted product is made available to European consumers so that stakeholders across the audio-visual industry are more able to recoup their substantial and risky investment in the production and distribution of content. Territorial exclusivity is critical to the practice of accommodating the different viewing preferences within the EU because it enables audio-visual products to be sold within member states on an exclusive basis and in a way which meets demand in each member state within the EU."

9. Sport is territorial by nature. National matches and competitions are watched more fervently by those from hosting or participating countries. This can be seen at a glance from the national lists of designated events which can be safeguarded by Governments for free-to-air television broadcasting. While the lists of course include major world events like the Olympics, they serve as a clear demonstration that sports events – from the Giro d'Italia in Italy, the finals and semi-finals of national and international football club competitions in Germany, to the All-Ireland Senior Inter-County Hurling Finals in Ireland – are principally of importance in domestic markets; their value and appeal likewise differs across Europe.

10. Territoriality was also recognised by the Commission in its 2003 UEFA decision, in which it notes that "media rights to football events like the UEFA Champions League are normally sold on a national basis. This is due to the character of distribution, which is national due to national regulatory regimes, language barriers, and cultural factors. The Commission therefore considers the geographic scope of the upstream markets for the media rights to be national".

11. The result is that sport has a very different value depending on the territory in which it is being watched. It is important for both sport and Europe's citizens that sport is allowed to be sold to media organisations territorially. If this was not the case, only the largest media organisations in Europe would win contracts and there is the possibility that smaller territories in which these organisations did not operate would receive less choice. The impact that this could have on smaller sports and grassroots sport could potentially be devastating, harmfully reducing sporting and cultural diversity.

4 "The benefits of territorial exclusivity in the European audio-visual industry", RBB Economics, London, February 2009.

4. The Benefits of Collective Selling

12. Whereas efforts to win larger market shares and hence to squeeze other market participants out of the market is an intrinsic element of competition in other economic sectors, sporting competition requires the preservation of the opponent by its nature and only creates a marketable product when different teams meet in the framework of a sporting contest. A condition for a league game to be held is the coming together of two teams in the framework of a sporting competition organised by an association and in the meantime established as a brand. The organisation of such complex sporting events is extremely cumbersome and inconceivable without the organisational input of leagues and federations. They lay down the ground rules for games and ensure that these rules are complied with. They monitor the authorisations of club and players using licensing proceedings, draw up a nationally and internationally co-ordinated framework calendar, plan match times, game opponents and the home/away rhythm, regulate player and transfer management, certify clubs' youth training centres, organise refereeing and the doping control system, protect the image and rights of the competitions and their members, and represent the competition vis-à-vis the outside world.

13. In its 2007 White paper on sport, the European Commission emphasised the eligibility of collective selling to be exempted from competition law, and in particular the advantages of the solidarity mechanism for the sporting balance of a league *“The application of the competition provisions of the EC Treaty to the selling of media rights of sport events takes into account a number of specific characteristics in this area. Sport media rights are sometimes sold collectively by a sport association on behalf of individual clubs (as opposed to clubs marketing the rights individually). While joint selling of media rights raises competition concerns, the European Commission has accepted it under certain conditions. Collective selling can be important for the redistribution of income and can thus be a tool for achieving greater solidarity within sports. The European Commission recognises the importance of an equitable redistribution of income between clubs, including the smallest ones, and between professional and amateur sport.”*

14. The European Parliament also expressly shared this view in two own-initiative reports and called on the Commission to present clear guidelines taking account of the specificity of sport which eliminates the current legal uncertainty – in particular regarding central marketing of sporting competitions.

5. New Developments in Sports Rights

15. Positively embracing the desire for greater international profiling and access, sport is developing its offer to reflect a new technological era. Sports' rights contracts are becoming more and more platform-neutral, allowing operators to provide online alternatives to their traditional diffusion method (in the case of some contracts even obliging them to do so). Sports bodies are also developing alternative platforms to supply territories in which there is no media platform willing to invest in traditional deals, so as not to discriminate against the minority communities and individuals with an interest in viewing their competitions; examples of this include World Marathons, the International Tennis Federation and Cricket Australia, who now offer online access to their events if no rights holders exist in a given territory.

16. Other sports also provide an online platform as an alternative even though events are shown on television. For example, all UEFA Champions League games are also available to watch “à-la-carte” through the UEFA website. Six Nations Rugby Limited gives its broadcasters certain rights to exploit their broadcasting rights on the Internet, including the right to simulcast in full their television and radio broadcasts of Championship programmes. Major events can nowadays be accessed legally and watched directly on the internet. Many legal offers exist and many more are in development. Nevertheless sports events are still widely pirated, contradicting the increasingly heard assertions that the solution to digital piracy, be it of sport, music or film content, is to provide alternative legal offers.

6. The Digital Piracy Threat

17. Sport content has been a stimulus to new audiovisual and broadcasting technology for some time. The Olympics in 2012 will see Super HD and 3D television showing events, and live streaming of over 5000 hours of sport will be available on the internet and broadcast on digital channels. That equates to over 200 days worth of live sport content.

18. However, major sports events and competitions are very attractive, and in great demand, making them particularly vulnerable to attack from pirates. Football has seen an increase in the amount of sites and viewers illegally watching content. Football is not, however, the most pirated sport globally. This dubious honour belongs to cricket, which sees around 1000 different websites illegally hosting pirated coverage of its live events. Many of them are funded by advertisement and over 200 of these websites are even operating as subscription channels, with the pirates being directly remunerated, without contributing to the development and advancement of sport or to jobs or to tax revenues and eliminating any pretence of an “open access philosophy”.

19. The Organisation for Economic Co-operation and Development (OECD) has acknowledged the significant threat to the creation and strengthening of legitimate services to distribute copyrighted content online caused by IP infringements, and the threat to innovation caused by IP infringement was made a top priority at the G8 Heiligendamm Summit. Moreover, the OECD has commissioned a case study of digital piracy in the sports sector as part of Phase II of its project on the Economic Impact of Counterfeiting and Piracy.

20. It should be noted that the challenges sport is facing are not identical to those the music and film industries are trying to tackle. The value of sport content is substantially based on its ‘live’ broadcast status and therefore the main challenge faced is combating illegal live streaming, more than re-useable recorded media as is the case for music and film. For this reason it is crucial to include sport in the various policy debates at national and international level.

21. The growing phenomena of internet streaming of live sporting events and peer-to-peer file sharing are very real examples of the need for a strong response to new trends in digital piracy which threaten to undermine the value of media rights and consequently investment in sport at every level. Technical measures such as notifications to users from their Internet Service Providers about breaches of IP rights, or the possible restriction (or in extreme cases even suspension) of services are needed. While legal action must only be taken as a very last resort, and in that instance preferably targeting the illegal websites and not the individuals using them, a credible legal threat is needed to help act against piracy.

22. A strong IP framework does not “hamper” the development of online content and services. It is our view that the contrary applies. Sport content is one of the first to be available on 3G technology. Sport organisations are the originators of economically significant content for audiovisual and audio broadcasts in their many formats, and across an ever increasing array of platforms. Sport organisations are constantly striving to bring consumers the widest range of choice of coverage that technology allows.

7. The QC Leisure and Euroview Sport Cases

23. The QC Leisure case was brought by the Premier League and one of its foreign licensees, Netmed Hellas (the licensee for Greece which operates as Nova), against two suppliers of foreign decoder cards, QC Leisure and AV Station, and four pubs which used foreign decoder cards in their pubs to show foreign broadcasts of live Premier League football.

24. The case concerns the legality of satellite television decoder cards authorised for use in one country of the EU but then exported for use in another. The claims brought by the Premier League and

Nova included a claim under section 298 of the Copyright Designs and Patents Act 1988, which gives effect in English law to the Conditional Access Directive (98/84/EC).

25. A number of organisations within the creative industries believe they could be affected by the outcome of the case. For this reason, UEFA and Sky as co-claimants recently brought an action against a supplier of European decoder cards, Euroview Sport, and this has also been referred to the Court of Justice of the EU. It is not yet known whether the Euroview Sport case will be joined with the QC Leisure case. In any event, the parties and EU Member States and institutions will soon be invited to submit written observations. Member States should be encouraged to do so.

26. QC Leisure and Euroview Sport are no longer about the narrow issue of football broadcasts from elsewhere in the EU being shown in pubs in the UK. The final decisions in these two cases call into question fundamental questions of the law relating to Copyright and Intellectual Property Rights generally and go to the heart of the EU's creative, audio-visual, broadcasting and broadband industries and those, like sport, which supply them.

27. Not only are a wide range of industries affected by the cases but also consumers and Member States. Consumers enjoy sport, film, TV programming and other audio-visual products tailored to their specific needs and languages. Member States are also affected as the Case could shortcut the ongoing debates at national and EU level and prevent EU Member States from playing their legitimate institutional role in the framework of the usual EU decision making process.

28. SROC has raised concerns with BIAC that adverse CJEU decisions (Negative Findings) in these cases could have a profound impact on a wide range of businesses dependent on the exploitation of intellectual property rights. They believe that negative findings would challenge long-established principles of copyright law and pose difficulties for buyers and sellers of any audio-visual programming which is exploited in more than one territory.

29. More specifically they say that negative findings would mean:

- An end to the recognised exclusivity principle and therefore threats on the value of audio-visual content which could affect investment, innovation and redistribution mechanisms;
- An end to the territoriality principle which is critical to the practice of accommodating the different viewing preferences within the EU because it enables audio-visual products to be sold in a way which meets differentiated cultural and linguistic demand. This would ultimately threaten cultural diversity, one of the EU fundamental principles; and
- A reduction of competition, as only substantial operators could exploit pan-European rights, thus discriminating small and local broadcasters and inhibit new entrants to the broadcasting markets.

8. Teams in Leagues and Federations: Single Entities, Joint Ventures, or Multiple, Independent Entities

30. Sport leagues and federations, like many joint ventures, enable a product that otherwise might not exist in the absence of the joint venture. Moreover, for many business transactions, they offer an efficient mechanism for working with vendors, suppliers and other third parties. BIAC supports flexible rules that allow sport leagues and federations to efficiently act on behalf of their constituent teams, but also prevent those individual teams from using the sports league as a shield to avoid competition where it would otherwise be appropriate.

31. Most recently, the US Supreme Court examined whether the 32 teams in the National Football League (NFL) could license their individual intellectual property collectively through a single corporate entity. The Court concluded – without passing on the legality of the underlying action – that such an arrangement amounted to concerted action involving multiple actors rather than a single economic enterprise.

32. The decision must be understood in context. Prior to 1963, the teams in the NFL made their own arrangements for licensing their intellectual property. In 1963, the NFL teams formed a corporate entity, National Football League Properties (NFLP), to collectively develop, license, and market their intellectual property. The NFL teams remained able to withdraw from this arrangement and at times sought to do so.

33. Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, permitting them to manufacture and sell apparel bearing team insignias. In 2000, the teams authorised NFLP to grant exclusive licenses, which NFLP did, excluding certain manufacturers that had previously licensed the intellectual property of some or all NFL teams.

34. In defending their conduct, the NFL teams, the NFL and the NFLP argued that they were a single economic enterprise, and thus incapable of conspiring under case law precedent. But, the Court examined the relationship not in terms of whether the parties were formalistically one or separate corporate entities, but rather whether the conduct of the parties demonstrated functionally separate economic actors pursuing separate economic interests. The Court asked, "whether the [NFLP] agreement joins together 'independent centres of decision making.'" Finding that each of the NFL teams is independently owned and independently managed, the Court found the NFL teams capable of conspiring. Importantly, the Court's opinion does not end the inquiry and whether the conduct alleged is unlawful was remanded for further determination.

35. The treatment of sports leagues and associations as joint ventures of separate economic actors, rather than as single entities, does not mean that their collective conduct is unlawful. Sports leagues and federations are often necessary to the existence of the respective sport. Indeed, but for such entities, no organised competition would exist. Accordingly, whether conduct by sports leagues and federations in the US violates the antitrust laws has often been adjudged under the more flexible rule of reason standard. Under the rule of reason, which undoubtedly will apply to future proceedings in the American Needle case, ancillary rules, necessary for orderly competition and production of the sport — including rules prohibiting gambling and substance abuse, requiring the use of certain equipment, and limiting player eligibility — normally have been upheld by the US courts. And rules imposed by the sports league or association that are not necessary to orderly competition and production of the sport — including rules capping the salaries of coaches and limiting the ability of franchises to relocate — sometimes have been deemed unlawful.

36. Rational businesses seek to expand their positions in the marketplace to the greatest extent possible. These objectives drive companies to out-perform their peers through superior innovation, efficiency and industry. But, oftentimes businesses can only achieve innovation and efficiency through joint conduct. Joint ventures create opportunities for innovation, marketing and manufacturing where such opportunities might not exist if undertaken by entities individually. Joint ventures often produce transactional efficiency without an adverse effect on competition. And, in some cases, joint arrangements between competitors can drive competition in the marketplace where none would otherwise exist — i.e., joint ventures can be market making. The sports community exemplifies this premise. Absent sports leagues and federations, competition between individual sports teams, and competition between disparate sports leagues, might not exist.

37. Sports leagues and federations, as joint ventures, should not be immune from the antitrust laws. Sports teams compete on the field, but also compete off the field in the business arena by contracting with

vendors, equipment suppliers, fans and other third parties. Having sports teams individually vie for this business may in certain instances be beneficial to consumers. In other instances, it may be more efficient for sports teams to operate collectively — e.g., in advertising the sports league or federation to which they belong.

38. The business community requires flexibility in the structures under which it operates. The ability to structure joint ventures that contain certain restraints is important to business and critical in many cases to ability and willingness of parties to form joint ventures. Businesses must be able to protect their inputs to the joint venture. Sports leagues and federations are no different and individual teams must be able to protect their contribution to league or federation. Moreover, the joint venture must be able to protect its collective intellectual property and act efficiently for the constituent teams.

39. BIAC supports flexible antitrust laws and rules that permit businesses to operate jointly where such operation does not demonstrably harm competition yet which also prevent unlawful conduct in those instances in which long-run consumer harm is a necessary result. As with other areas of commerce, authorities should neither create rules that are so overly stringent as to bind the hands of businesses, nor allow impermissible conduct to hide behind the guise of joint ventures.